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INTRODUCTION TO CIVIL PROCEDURE, by Alison Reppy. Dennis & Co., Buffalo, 1954. Pp. xiv, 860. \$8.50.; CASES AND MATERIALS ON CIVIL PROCEDURE, by Bernard C. Gavit. Bobbs-Merrill Co., Indianapolis, 1953. Pp. xi, 582. \$8.50.

Glen E. Weston

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attention on the text, because it is tightly packed, heavily foot-noted, and the subject matter sometimes gets a little involved, or just dull.

The reader could not wish for better guides into the material. The index is first rate. Appendix I, a table of United States treaties, is useful. Appendix II deals with the international law standard in the treaty practice of other selected states. Perhaps it is not permissible to draw any conclusions about the general topic from the fact that the practices of all save one of the old (pre-World War II) major powers, including Nazi Germany and the U.S.S.R., do not appear too dissimilar from U.S.A. practice in regard to treaty references to the international standard. The exception was Japan, but the possible implications of this escape the reviewer.

*Covey T. Oliver\**

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Legal education has not been impervious to the criticism it has received from the bar in recent years. Although much of this criticism has been uninformed and histrionic, some has been reasoned and constructive. The latter has stimulated considerable self-examination on the part of law schools that has not been merely narcissistic in character. Self-appraisal has revealed a wide disparity of views as to what law schools can and should teach. This is most forcefully displayed in the area of procedural courses by the number and variety of new casebooks.<sup>1</sup> These books range widely from the "survey" courses

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1. In addition to the two casebooks reviewed here, see HAYS, CASES AND MATERIALS ON CIVIL PROCEDURE (1947); ATKINSON & CHADBURN, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE (1948); MICHAEL, THE ELEMENTS OF LEGAL CONTROVERSY (1948); SCOTT & SIMPSON, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE (1950); CLEARY, CASES ON PLEADING AND RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (1951); BLUME & REED, PLEADING AND JOINDER, CASES AND STATUTES (1952); CLARK, CASES ON MODERN PLEADING (1952); VANDERBILT, CASES AND OTHER MATERIALS ON MODERN PROCEDURE AND JUDICIAL ADMINISTRATION (1952); BROWN, VESTAL & LADD, CASES AND MATERIALS ON PLEADING AND PROCEDURE (1953); FIELD & KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE (1953).

through those that are devoted to intensive studies of limited topics such as joinder, federal procedure, or common law pleading. One book even couples the topics of judicial administration with both civil and criminal procedure. A few civil procedure casebooks cover evidence and trial practice as well as pleading. Several strive to instill the attitude of evaluation, while others concentrate exclusively on expounding detailed information.

Two of these casebooks, Reppy, *Introduction to Civil Procedure* and Gavit, *Cases and Materials on Civil Procedure* are illustrative of two divergent views of what the content of a course in civil procedure should be. Both are apparently designed for the beginner's course in procedure, and Dean Reppy's book assumes that some additional courses in procedure will follow.

Dean Reppy's book is limited entirely to common law pleading except for frequent unconvincing attempts to reassure students of the practicality of common law materials. After an introductory chapter dealing with such preliminary matters as court systems, jurisdiction and summons, the bulk of the book (almost 400 pages) is devoted to the forms of action, with considerable attention paid to such "theological" questions as whether the action on the case was originated by the Statute of Westminster II or whether the "revolutionary" view that the Statute had nothing to do with the origin of this form of action is the correct view. For each form of action there is a subsection entitled "Status Under Modern Codes and Practice Acts" which the editor explains in the preface is inserted "with the idea of developing in the student's mind the psychology of present-day usefulness of the subject" and which he further asserts contains cases decided under "modern Codes and Practice Acts, which take their rule directly from the common law." The concept of "modern" used in the book appears to be that of the historian, since there is only one such illustrative case as late as 1939, and approximately half of the "modern" cases are dated in the 1800's; all but two are New York cases decided under a code not truly "modern" in view of significant advances made by the Federal Rules of Civil Procedure. Significantly absent are cases and discussion of the Federal Rules, except for two meager pages in the first chapter and one aberrant case where the federal court felt obligated to apply an archaic Delaware statute of limitations.

Dean Reppy's preface candidly discloses that he has experienced initial difficulty in making students understand how "practical" and important the study of common law pleading is. In fairness to him, the reviewer's criticism stems almost entirely from a fundamental difference of viewpoint concerning the wisdom of this method of introducing students to procedure. Far from being "valuable as an exercise in legal logic" as the introduction states that a study of common law pleading is, such a course is likely to prove destructive of ability to reason clearly because it breeds the narrow technical frame of mind that has given the word "legalistic" a derogatory content in the vocabulary of many laymen and social scientists. Perhaps Dean Reppy and a few other teachers have the exceptional ability required to make a course of this nature interesting to students; the reviewer seriously doubts if there are many who possess such talents. And even those few may be wasting talents that could better be utilized in teaching a modern course in procedure that would use common law pleading only for the very limited purpose of explaining why the modern rule was adopted, how it represents a significant advance over the common law or early code rule and how its application must be constantly supervised to assure that it does not become stultified.

Moreover, the reviewer believes that teaching the replication *de injuria*, the special traverse, repleader and other similar matters that are completely archaic is unlikely to further the "brain washing" objective stated in the preface of trying to "remove from the student's mind the notion that the subject is obsolete." As a means of accomplishing this Crogate's Case is presented without benefit of the devastating contemporary criticism of special pleading based on it, entitled "Crogate's Case: A Dialogue in ye Shades of Special Pleading Reform."<sup>2</sup>

If one desires to teach a casebook course in common law pleading Dean Reppy's book is a useful one. The cases are well selected for that purpose and the editor has made generous use of the more recent historical researches on the subject, such as Fifoot.<sup>3</sup> But in the reviewer's opinion such a course should be taught *qua* history rather than as procedure. The reviewer shares Dean Reppy's optimism that procedure can be made in-

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2. HAYES, CROGATE'S CASE: A DIALOGUE IN YE SHADES ON SPECIAL PLEADING REFORM, reprinted in 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 417 (2d ed. 1938).

3. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW (1949).

teresting, but believes that the way to accomplish this is to place the cases and concepts in the context of current procedural problems in modern litigation, and to make use of drafting problems and case records, with major emphasis upon the Federal Rules.

The late Dean Gavit's casebook differs materially. It is obviously designed to convey a maximum of informational details about modern procedure without the use of common law pleading. It neither attempts to develop reasoning power nor to encourage critical evaluation. This is manifest from the prefatory remark that the "principal asset for mastery of procedure is a good memory." The book is suitable for a survey course where the major objective is familiarization of students with all of the concepts of procedure. Its greatest asset is the extent of its coverage, which includes everything from the commencement of action through the trial and appellate stages.

But such broad coverage is impossible without sacrifice of other important objectives. The book has sacrificed any attempt either to present the major problems of procedure, such as congested court calendars, time lags, and expense of litigation, or to evaluate any of the rules and the way courts apply them. It is greatly to be regretted that one with the broad experience and knowledge of the editor did not include critical comments or questions for the benefit of students and for use in classroom discussions. While the book follows the salutary trend toward emphasizing the Federal Rules, it does not present either the important comparisons of such rules with those of code pleading or the sharp controversies over such matters as the summary judgment procedure, the "cause of action" versus "claim for relief," the abuse of discovery procedures in the "big case," or the problems created by the union of law and equity.

The material in Dean Gavit's book is arranged chronologically, beginning with the commencement of the action and taking each successive procedural step. Some of them necessarily receive only summary treatment. Others, such as motions, the manner of pleading, and discovery are ruthlessly abridged. The extremely important topic of discovery is summarily treated in 10 pages, 7 of which consist of the *Hickman* case.<sup>4</sup> On the other hand, the use of demonstrative evidence takes up 12 pages although the book makes no real attempt to cover the topic of

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4. *Hickman v. Taylor*, 329 U.S. 495 (1947).

evidence. Likewise, the topic of selection of the jury encompasses a disproportionate space of 17 pages and the introduction of evidence takes up another 10 pages. Most of the important cases in the book are severely (though skillfully) edited.

Among the better features of the book is its painstaking effort to see that no important procedural step or concept (except perhaps enforcement of judgments and a few other matters) is omitted from the curriculum. Use of the book would assure that the student would be familiar with every major procedural step. Another unique salutary feature is Dean Gavit's inclusion of relevant ethical considerations along with the procedural information. Finally, the supplement containing the Federal Rules is a distinct advantage lacking in many procedural casebooks.

In some respects both books are alike. Both seem to be based upon a conception of law as simply a body of rules applied rather mechanically by a judge who, unless his memory is dim or analysis is faulty, cannot help but deduce the correct rule. No intimation is made that judges may exercise creative functions even in dealing with mundane problems of procedure. Similarly neither book makes an attempt to instill an attitude of evaluation of the procedural rules they expound. Nevertheless, there is a subtle underlying premise to Dean Reppy's book that the essence of common law pleading should be preserved intact (or perhaps more correctly, that we should *return* to that system). Likewise, in Dean Gavit's book there is an inference of a preference for retention of the *status quo*. Neither of these preferences corresponds to those of the reviewer who would choose to regard any set of procedural rules as merely a means of achieving a *desideratum* of a speedy and inexpensive decision on the merits of the case as determined by principles of substantive law. Procedural rules are not immutable but are constantly in need of surveillance by lawyers, judges and law teachers to ascertain whether they are operating to advance or retard this objective.

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